

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9500 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
Yes.
2. To be referred to the Reporter or not? No. :
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
No.
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No. : NO
5. Whether it is to be circulated to the Civil Judge? No.

SAJID JIKKAR HAJI AYUB TELI S/O.DETENU JIKKAR HAJI AYUB

Versus

UNION OF INDIA

Appearance:

MR MB AHUJA for Petitioner

MS PARINDA DAWAWALA for respondent NO. 1.

MR KT DAVE ASST.GOVERNMENT PLEADER for Respondent No. 2, 3

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 17/09/1999

ORAL JUDGEMENT

1. Heard Learned Advocate Mr. M.B. Ahuja for the petitioner and Ms. Parinda Dawawala for respondent No. 1 and learned A.G.P. Mr. K.T. Dave for respondent NOS. 2 and 3.

2. By filing this petition under Article 226 of the Constitution, the petitioner has prayed for appropriate Writ or Direction to quash and set aside the order of detention dtd. 30th September, 1998, passed against the father of the petitioner by respondent NO. 2, in exercise of powers conferred by Sec. 3 (1) of Conservation of Foreign Exchange and Prevention of

Smuggling Activities Act, 1974 ("COFEPOSA" for short).

3. The petitioner has contended that his father Jikar Haji Ayub Teli was arrested on 7/1/98 in respect to the offence made punishable under Sec. 135 of Customs Act, 1962 and was produced before the Court of Addl. Chief Metropolitan Magistrate, Ahmedabad and was sent to Judicial Custody. That on 6th January, 1998, the Officer of the Customs Department, carried out the search at the residential premises of the father of the petitioner (detenu) and during search, foreign currencies of various denomination issued by different countries, were recovered from the Cupboard. The Customs Officers have valued the said currencies to the extent of Rs. 5,18,480/-. It is alleged that the petitioner (detenu) could not explain or produce legal documents to hold such foreign currency and as such the said foreign currency was seized under reasonable belief that the same was liable for confiscation under the provisions of Customs Act, 1962 as well as under the Foreign Exchange Regulation Act, 1973. That thereafter, a complaint has been filed against the father of the petitioner (detenu) in the Court of Addl. Chief Metropolitan Magistrate, Ahmedabad, which is pending for trial. That the father of the petitioner applied for bail and on his subsequent application, the father of the petitioner was ordered to be released on bail on the terms and conditions stated in the order. However, in the meantime, the respondent No.2 - Principal Secretary to Govt. of Gujarat, Home Department (Special), Sachivalaya, Gandhinagar, passed the impugned order dtd. 30-9-1998 and the father of the petitioner has been detained under Sec. 3 (1) of COFEPOSA Act. That the petitioner has challenged the legality, validity and propriety of the said detention order on numerous ground.

4. Shri M.B. Ahuja, learned advocate appearing for the petitioner has assailed the impugned order on the ground of delay in consideration of the representation made by the detenu. It is submitted that the representation dt. 30/10/98 was addressed to the Advisory Board of COFEPOSA, and the copies of the same were forwarded to Union of India - Respondent No. 1 as well as to the State Govt. That the petitioner has raised the specific plea by amending the petition on 13/7/99 by adding the additional grounds vide para 8(q) to 8(s). However, no reasonable explanation has been provided by the respondent No. 1, Union of India, though affidavits in reply are filed. Elaborating the submission it is urged that the representation dt. 30/10/98 was received by the respective authorities only

on the next day of dispatch. However, the State Govt., has communicated the rejection of the same on 16/12/98, while the respondent NO. 1 has rejected the same on 24/12/98. Thus, there is a delay of about 45 days and 54 days in considering the same by Respondent No.2 and Respondent NO. 1 respectively for which there is no explanation in the affidavits placed on record. That on account of inordinate delay in considering the representation of the detenu by Respondent No. 1., the continued detention has become illegal due to violation of fundamental rights of the detenu, guaranteed vide Article 22 (5) of the Constitution.

That to support the submission Shri Ahuja has referred to and relied on the observation made by the Supreme Court in the matter of Rajamal Vs. State of Tamilnadu and another reported vide AIR 1999 SC 684.

5. As against that Learned A.G.P. Shri K.T. Dave has submitted that so far as the State Govt. and Respondent NO. 2 are concerned, there is no delay in considering the subject representation of the detenu. Relying on the affidavit filed by the Under Secretary to Govt. of Gujarat, Home Department (Special) Sachivalaya, Gandhinagar, it is urged that the representation dt. 30/10/98 sent on behalf of the detenu was received and immediately remarks were called from Customs Department and thereafter it was proceeded and placed before C.M. who on due consideration rejected the same on 23/11/98. The decision was communicated on 24/11/98. Furthermore, one copy of the same was placed before the COFEPOSA Advisory Board along with other papers in the next meeting held on 27/11/98 and after due consideration of the same, the report/opinion of the Advisory Board was received by the State Govt. on 11/12/98 and accordingly the detention order was confirmed and the communication was immediately sent to the detenu. Thus, except the time consumed in administrative process, there is no delay in considering the said representation and as such the petitioner is not entitled to claim any benefit on the said ground.

6. That the abortive attempts made by learned A.G.P. Shri K.T. Dave on behalf of the Respondent Nos. 2 and 3, could hardly salvage the matter in dispute. It may be noted that the power of Central Govt. under Sec. 11 of COFEPOSA, to revoke or modify the detention order, is independent of confirming or setting aside the order of detention under Sec. 8(f) of COFEPOSA as held by the

Supreme Court in the matter of Sat Pal Vs. State of Punjab and others, reported vide AIR 1981 S.C.C. 2230. That in the matter of Taraehand Vs. State of Rajasthan, reported vide AIR 1980 S.C. 1361, it is held that an inordinate delay in consideration of the representation against the order of detention passed by the State Govt. renders the detention invalid.

7. That in the matter of K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India, reported vide (1991) 1 S.C.C. 476, the constitution Bench of Supreme Court has made relevant and material observation as under;

"It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in Clause (5) of Article 22 reflects the concern of Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law within which the representation should be dealt with. The requirement however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be breach of constitutional imperative and it would render the continued detention impermissible and illegal."

8. In the instant case, it is not disputed that the respondent NO. 1 has received the representation dtd. 30/10/98 of the detenu on the next date of dispatch. That though the affidavit-in-reply on behalf of respondent No. 1 is filled on 1/9/99. Sworn by Dy. Commissioner, Customs Division, Ahmedabad, there is no explanation much less a reasonable explanation to explain the delay of about 54 days, in considering the said representation till 24/12/98, as alleged by the petitioner vide para 8(s) of the petition. That as such, I am constrained to hold that such delay being fatal to the continued detention of the detenu, the petition deserves to be allowed.

9. That though the petitioner has challenged the

detention order on various grounds, as the petition succeeds on the first point, it is not necessary to deal with the issue on the other grounds and decide the same.

10. On the basis of aforesaid discussion, the petition is allowed. The impugned order of detention dated 30th September, 1998, passed by the respondent NO. 2 - Principal Secretary to the State Govt. of Gujarat, Home Department (Special), Sachivalaya, Gandhinagar, against the detenu Jikar Haji Ayub Teli, is hereby quashed and set aside and the said detenu - Jikar Haji Ayub Teli is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute accordingly.

D.S. Permitted.

Rafik*